IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPLICATION NO. 716 OF 2005

ADNAN BILAL MULLA .. APPELLANT

Versus

THE STATE OF MAHARASHTRA .. RESPONDENS

Mr. Mubin Solkar for appellant

Mr. S. R.Borulkar PP

CORAM: SMT. RANJANA DESAI &
ANOOP V. MOHTA, **JJ.**
DATED: 6/10/2005

ORAL JUDGMENT: (Per Smt. Ranjana Desai, J.)

. Admit. Respondent waives service. By consent of the parties taken up for hearing forthwith.

2. The appellant along with others is being tried in POTA Special Case No. 2/03 in the Special Court constituted under The Prevention of Terrorism Act, 2002 ("POTA" for short).

3. In this case the appellant accused preferred application for certain reliefs. The application preferred by the appellant is M. A. No. 26/05. The application contained following prayers:

a) To restrain the Prosecution from proceeding with

a joint trial in respect of Mulund Bomb Blast offence i.e. DCB, CID C.R. No. 21/03, the Vile Parle Bomb Blast i.e. C.R. No. 09/03 and the Bombay Central Bomb Blast i.e. C.R. No. 124/02 i.e. 59/03.

b) To direct the Respondents/Prosecution to take comply with the necessary pre-trial formalities in order to separately proceed in respect of Mulund Blast vide C.R. No. 21/03. Vile Parle Blast vide C.R. No. 09/03 and Mumbai Central Blast vice C.R. No. 59/03.

c) To stay framing of charges of Joint Trial in POTA SPL. Case No. 2/2003 till final hearing and disposal of this application.

4. The special court by its order dated 30th July, 2005, rejected the application. Being aggrieved by the said judgment and order, the appellant has preferred this appeal under Section 34 of the POTA.

5. Before we go to the rival contentions it is necessary to have a look at the facts. The city of Mumbai and it’s suburbs were rocked by a series of bomb blasts which took place between 2/12/2002 and 13/3/2003 i.e. within a period of about three months. The first bomb blast occurred on 2/12/2002

at Ghatkopar in a bus near the railway station. It was registered as DCB CID C.R. No. 156/02. The second bomb blast took place on 6/12/02 near Mc Donald Restaurant at Bombay Central Railway Station. It was registered as DCB CID C.R. No. 59/03. The third bomb blast took place on 27/1/03 at Vile Parle vegetable market and it was registered as DCB CID C.R. No. 9/03 and the fourth bomb blast took place on 13/3/03 at Mulund in Karjat bound train. It was registered as DCB CID C.R. No. 21/03 It is a matter of common knowledge that these blasts caused heavy damage to the property and resulted in loss of human lives.

6. The basic submission of Mr. Solkar, learned counsel for the appellant is that all these blasts are distinct incidents constituting distinct offences and investigated by distinct officers. They are cases registered at distinct police stations. Independent applications are preferred by different officers in these cases and, therefore, they cannot be clubbed together and cannot be tried together.

7. Mr. Solkar pointed out that in respect of Ghatkopar bomb blast six accused were arrested. In respect of Bombay Central and Vile Parle blasts no arrests were effected till April, 2003. On 10/4/03

Nachan accused 1 surrendered in Mulund blast case. Mr. Solkar pointed out that all 16 accused who are implicated in Mulund blast case are not implicated in Mumbai Central and Vile Parle bomb blast cases. The appellant was arrested on 9/6/2003 only in connection with Mulund blast. He is not arrested in connection with other blasts. Only 11 accused are implicated in Vile Parle bomb blast incident and 8 accused are implicated in Mumbai Central bomb blast incident. He contended that there is no material to show that all these acts form part of the same transaction. Mr. Solkar further pointed out that the two replies filed by the prosecution in the special court contain contradictory averments. Whereas in one reply it is stated that different acts have been committed by different accused persons in pursuance of and in accomplishment of the same object of conspiracy and, therefore, all the offences committed by the accused can be jointly tried in the other affidavit it is stated that there is no question of joint trial. Mr. Solkar then contended that the learned judge has wrongly relied on Sections 184 and 219 of the Criminal Procedure Code (2 of 1974) ("Code" for short). He submitted that Section 184 only refers to place of trial for offence. It refers to the jurisdiction or competence of a court to try offence and Section 219 refers to a specific

person. It does not refer to different accused, accused of different offences which is the case here.

8. He drew our attention to Section 219(2) where the meaning of phrase offence of the same kind is given. The learned counsel submitted that the offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code or of any special or local laws. He submitted that if this meaning of the term offence of the same kind is taken into consideration Section 219 can never have application to the facts of this case. He submitted that the prosecution cannot resort to Section 219 when there are different accused, accused of different offences because there is an express provision under Section 223 of the Code for that purpose. He, therefore, submitted that the special court has fallen into a grave error in coming to the conclusion that Section 184 and Section 219 of the Code are attracted to the facts of the present case. The judgment of the Special Court, therefore, suffers from patent illegalities and deserves to be set aside.

9. The learned counsel contended that to the facts of this case even Section 223 of the Code will not

be applicable because to fall under this category the appellant will have to be accused of all the offences which is not the case here. He submitted that the appellant is arrested only in the Mulund blast case. Drawing our attention to Section 223 (d) the learned counsel contended that Section 223 (d) has three ingredients. He submitted that there must be more than one person, such persons must be accused of different offences and the offences must be committed in the course of the same transaction. The learned counsel urged that undoubtedly there are more than one persons in this case, and there are three different offences. But it can never be said that these offences are committed in the course of the same transaction.

10. In support of his submission the learned counsel relied on Jayaraj alias James v. State of Kerala, 2001 CRI. L.J. 4059, D. K. Chandra v. The State, 1952 Cri. L.J. 779, Yusuf Khan v. Emperor A.I.R. (35) 1948 Patna 122.

11. Referring to Jayaraj's case Mr. Solkar contended that there two separate cases were not registered for the two offences, but the seizure in question had taken place in quick succession. The Kerala High Court observed that the two acts were so connected together as to form the same

transaction and they are committed by the same person and, therefore, one trial was sufficient for two acts. Mr. Solkar contended that, therefore, if there are different offences registered at different police stations, they cannot form the same transaction and cannot be tried together.

12. The learned counsel referred to following observations of the Full Bench of this court in D. K. Chandra's case where this court was considering the relevant provisions of the Criminal Procedure Code (1898) ("Code of 1898" for short);

. "If the prosecution wishes to justify a trial in which charges are joined, it is for the prosecution strictly to establish that the joinder is permissible under either S. 234, 235 or 236. It is well known canon of construction that exceptions must be strictly construed, and unless the prosecution satisfies the Court that the exception has been strictly complied with, the joinder of charges in a trial must be held to be contrary to law. It may be possible in a conceivable case for the prosecution to establish that a case falls under more than one exception. But if it falls under more than one exception it must so fall that it must not infringe the provisions of any of the three sections. It is not permissible for the

prosecution to combine and supplement the three sections in such a manner as to contravene the provisions of any of these three sections."

13. He then took us to following observations of the Patna High Court in Yusuf Khan’s case (supra);

. "Whether the offences are committed in course of the same transaction is to be judged from a common sense point of view. Uniformity of time or place are not sufficient to make one transaction of the acts committed then and there. There must be accomplishment of a certain object or performance of a certain act in view. In order that the different acts will make up one transaction, it must be inherent in them that from the very beginning of the earliest act or the first act, the other acts should either be in contemplation, or should from the very nature of the transaction in view form the component parts of one whole. Continuity of action is not intended in the sense that one act must immediately follow the other without any other connection. Continuity refers not to the time so much as to the intimate connection between the acts."

14. Mr. Solkar also relied on Imtiaz Ahmed v. State of Madhya Pradesh 1997 Cr. L. J. 1841 and

urged that in cases of incidents involving more than one accused persons, if offences are not prima facie made out against the accused persons individual framing of common charges against all the accused is improper.

15. Relying on these judgments the learned counsel contended that unless there is intimate connection between the acts or the acts form the component parts of one whole they cannot be said to have been committed in the course of the same transaction. Such connection according to Mr. Solkar is lacking in this case.

16. Mr. Solkar further submitted that the prosecution does not have any evidence to establish conspiracy. He submitted that the confessional statement of accused Dr. A. Wahid Ansari, who has allegedly confessed of his involvement in two offences of bomb blasts, i.e. i.e. at Vile Parle and Bombay Central is absolutely silent about Mulund blast. The confessional statement of accused 2 Muzammil Ansari does not reveal any facts against the appellant. In the circumstances there is nothing to indicate that the different offences are committed in the course of same transaction or there is any conspiracy at all.

17. We have also heard at length Mr. Borulkar, learned PP. He submitted that the accused are charged with conspiracy. There is enough indication in the evidence that all the offences form part of the same transaction. He contended that the present case is covered by Section 223(d) of the Code. He relied on Aftab Ahmed Khan v. State of Hyderabad, AIR 1954 SC 436, Kadiri Kunhahammad v. The State of Madras AIR 1960 SC 661, The State of Andhra Pradesh v. Cheemalapati Rao & Anr., AIR 1963 SC 1850, Mohan Baitha & Ors. v. State of Bihar & Anr., AIR 2001 SC 1490 and a judgment of this court in State of Maharashtra v. Anjanabai, 1997 Cr. L.J. 2309, and contended that no interference is necessary with the impugned order.

18. The relevant provisions of the Code will have to be seen to understand the submissions of the learned counsel. Section 218 of the Code states that for every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately. Sub-section (2) further states that Nothing in sub-section (1) shall affect the operation of the provisions of sections 219,220,221 and 223. Therefore, separate trial is a rule. Section 219, 220, 221 and 223 carve out exceptions to this rule.

Section 219 says that when a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, whether in respect of the same person or not he may be charged with and tried at one trial for the same. However, the offences shall not exceed three. Section 220 provides for trial for more than one offence. Section 220(1) says that if, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence. Section 223 states what persons may be charged jointly. In our opinion in this case we would be concerned with Section 223 (d) because different offences are committed in the course of the same transaction. Section 223 so far as it is relevant reads thus:

. "223. What persons may may be charged jointly- The following persons may be charged and tried together, namely:-

(a) . . . . . .

(b) . . . . . .

(c) . . . . . .

(d) persons accused of different offences committed

in the course of the same transaction;

(e) . . . . . .

(f) . . . . . .

(g) . . . . . .

19. Before we proceed further we may note that though Mr. Solkar has tried to address us on Ghatkopar blast we propose to leave it out because the said case was tried separately. The accused therein have been acquitted. We may also note that some of the judgments which have been cited before us on the question of joint trial deal with the relevant provisions of the Code and some deal with the relevant provisions of the Code of 1898. These provisions are almost identical and the principles underlying them are the same.

20. In Aftab’s case (supra) the Supreme Court was considering the question of joint charges and joint trials. In that case the offence of extortion was committed on 14th September. It was one of series of acts connected with the offence of murder and attempt to murder committed on the previous day so as to form the same transaction. The Supreme Court was dealing with the relevant provisions of the Code of 1898. The Supreme Court noted that section 233 embodies the general law as to the joinder of charges and lays down a rule that for every

distinct offence there should be a separate charge and every charge should be tried separately. It was observed that the object of Section 233 is to save the accused from being embarrassed in his defence, if distinct offences are humped together in one charge or in separate charges and are tried together, but the legislature has engrafted certain exceptions upon this rule contained in Sections 234, 235, 236 and 239. The Supreme Court referred to Section 235 which provided that if in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person he may be charged with and tried at one trial for every such offence. The Supreme Court observed that the fact that the offence of extortion was committed at a different place and at a different time does not any the less make the act as one committed in the course of the same transaction.

21. In Kadiri Kunhahammad's case (supra) the Supreme Court was again considering the question of joint trial. It was interpreting the relevant provisions of the Code of 1898. The Supreme Court observed as under:

. "It is true that, in framing the charge against more persons than one and directing their joint

trial, courts should carefully examine the nature of the accusation; but if they are satisfied that prima facie the accusation made shows that several persons are charged of different offences and that the said offences prima facie appear to have been committed in the course of the same transaction, their joint trial can and should be ordered."

22. In Cheemalapati Ganeswara Rao's case (supra) the same question fell for consideration before the Supreme Court. The Supreme Court was dealing with the Code of 1898. It was urged that there was misjoinder of charges and persons in that the various provisions of S. 239 were clubbed together and an omnibus charge of conspiracy was framed which on its face was likely to embarrass the accused and make their task of defending themselves difficult. The Supreme Court noted that under Section 235 (1) (which corresponds to present Section 220(1)) what has to be ascertained is whether the offences arise out of acts so connected together as to form the same transaction but the words "so connected together as to form" are not repeated after the words "same transaction" in Section 239 (which correspondence to present Section 223). The Supreme Court, therefore, considered whether these words are also to be read in all the clauses of Section 239 which refers to

the same transaction. Following are the material observations of the Supreme Court.

. "What is meant by "same transaction" is not defined anywhere in the Code. Indeed, it would always be difficult to define precisely what the expression means. Whether a transaction can be regarded as the same would necessarily depend upon the particular facts of each case and it seems to us to be a difficult task to undertake a definition of that which the Legislature has deliberately left undefined. We have not come across a single decision of any Court which has embarked upon the difficult task of defining the expression. But it is generally thought that where there is proximity of time or place or unity of purpose and design or continuity of action in respect of a series of acts, it may be possible to infer that they form part of the same transaction. It is, however, not necessary that every one of these elements should co-exist for a transaction to be regarded as the same. But if several acts committed by a person show a unity of purpose or design that would be a strong circumstance to indicate that those acts form part of the same transaction. The connection between a series of acts seems to us to be an essential ingredient for those acts to constitute the same transaction and therefore, the mere

absence of the words "so connected together as to form" in cls. (a), (c) (sic) and (d) of S. 239 would make little difference."

23. We may also note that Full Bench decision of this court in D. K. Chandra's case on which Mr. Solkar has placed reliance has been considered and distinguished by the Supreme Court in this case.

24. In Mohan Baitha's case (supra) the Supreme Court interpreted Section 220 of the Code and observed as under:

. "It may be noticed that under Section 220 of the Code of Criminal Procedure, offences more than one committed by the same persons could be tried at one trial, if they can be held to be in one series of acts, so as to form the same transaction. The expression "same transaction" from its very nature is incapable of an exact definition. It is not intended to be interpreted in any artificial or technical sense. Common sense and the ordinary use of language must decide whether on the facts of a particular case, it can be held to be in one transaction. It is not possible to enunciate any comprehensive formula of universal application for the purpose of determining whether two or more acts constitute the same transaction. But the

circumstances of a given case indicatting proximity of time, unity or proximity of place, continuity of action and community of purpose or design are the factors for deciding whether certain acts form parts of the same transaction or not. Therefore, a series of acts whether are so connected together as to form the same transaction is purely a question of fact to be decided on the aforesaid criteria".

25. The above authoritative pronouncements of the Supreme Court lay down that, if there is proximity of time or place or unity of purpose and design or continuity of action in respect of series of acts it can be said that the acts form part of the same transaction. It is not necessary that every one of these elements must coexist. But connection between a series of acts is an essential ingredient for those acts to constitute the same transaction.

26. If these principles are applied to the present case, we feel that the appellant can be jointly tried with other accused. The three bomb blasts took place between 6//12/02 and 13/3/2003. They occurred within a span of about three months. They occurred in thickly populated areas. In all the three cases common people were targeted. The three blasts prima facie have similar pattern and mode. In our opinion, a common thread runs through all

these incidents. Though initially these cases were registered at different police stations, by office order dated 12th July, 2003 they were clubbed together and the investigation was directed to be conducted under a chief investigating officer. In our opinion, these incidents are so connected together as to form part of the same transaction.

27. Besides the accused have been charged with conspiracy. The criminal conspiracy alleged is to inter alia commit terrorist acts or to commit preparatory acts towards terrorist acts to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or section of the people by aiding and abetting each other to commit terrorist acts or acts preparatory to terrorist acts in or around Mumbai by use of bombs, dynamites, other explosive substances or inflammable substances, fire arms or other lethal weapons of hazardous nature in such a manner to cause death or injuries of persons and to cause damage or destruction of property and disruption of services essential to the life of the community.

28. It was argued by Mr. Solkar that there is hardly any evidence of conspiracy. In order to satisfy ourselves and in view of the statement made by Mr. Solkar that this court can have a look at

the confessional statements, we had a look at them. At this stage, we are of the prima facie opinion that the charge of conspiracy is borne out by the material which is in possession of the police.

29. Once the accused are charged with conspiracy it is not necessary that the person sought to be jointly tried must be actual party to the committing of all offences which are committed in the course of same transaction. His actual participation may be only in one or some of the offences but if there is common concert and agreement which constitute the conspiracy it serves to unify the acts done in pursuance thereof In such cases all the acts of all the persons must be held to have been done in the course of one and the same transaction.

30. Viewed in the light of the above judgments of the Supreme Court, we have no manner of doubt that the present accused can be tried jointly with others. In our opinion the case would clearly be covered by Section 223(d) of the Code. The learned counsel urged that the reliance placed by the Special Court on Section 184 and Section 219 of the Code is wholly misplaced. We are of the opinion that the ultimate view taken by the Special Court that the appellant can be tried jointly is correct,

hence we need not delve into this issue. In the circumstances the appeal is dismissed.

31. At this stage Mr. Solkar seeks extension of stay which is already granted by this court Mr. Borulkar, learned PP vehemently opposes this. He says that this is a tactic employed by the appellant to delay disposal of the case. In the facts and circumstances of the case, we deem it fit to extend the stay by a period of further two weeks.

(SMT. RANJANA DESAI, J.)

(ANOOP V. MOHTA, J.)